

**ORIGINAL**

**FILED**

July 26 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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**IN THE SUPREME COURT OF THE STATE OF MONTANA**  
**DA 10-0226**

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PARK PLACE APARTMENTS, L.L.C.,

Plaintiff and Appellant

v.

FARMERS UNION MUTUAL  
INSURANCE COMPANY, WILLIAM F.  
WILHELM AND MONTANA FARMERS  
UNION INSURANCE AGENCY, INC.,

Defendants and Appellees,

**DEFENDANT, THIRD-PARTY  
PLAINTIFF AND APPELLEE  
WILLIAM F. WILHELM'S  
BRIEF IN OPPOSITION TO  
MOTION TO FILE *AMICUS*  
BRIEF**

WILLIAM F. WILHELM,

Third-Party Plaintiff and  
Appellee,

v.

WHITEFISH INSURANCE AGENCY,  
INC., A Montana Corporation,

Third-Party Defendant and  
Appellee.

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### **STATEMENT OF ISSUE**

Defendant/Appellee William Wilhelm (“Wihelm”) submits the following brief in opposition to the motion by the Montana Trial Lawyers Association (MTLA) to file an *amicus curiae* brief. This lawsuit arises from a dispute between Plaintiff Park Place Apartments and Defendant Farmers Union regarding insurance coverage at an apartment complex in Whitefish. William F. Wilhelm is the insurance agent who prepared the original application for insurance in 2001. In 2008, a carport at the apartment complex collapsed and Park Place made a claim under the policy. Farmers Union denied the claim because the carport is not a listed building on the declarations page. Following the denial of coverage, Park Place brought suit against Farmers Union for breach of contract and insurance bad faith. Park Place has also asserted a negligence claim against William F. Wilhelm. Park Place alleged Wilhelm acted negligently in the event the Court determined no coverage existed because Park Place sought “full” insurance coverage. (Pl.’s Am. Compl. at 21); (Pl.’s Resp. to Wilhelm’s Interrog. No. 11).

After conducting discovery, Farmers Union, Park Place, and Wilhelm moved for summary judgment on the respective claims asserted against the parties. In Wilhelm's motion for summary judgment, he asserted the claims against him should be dismissed for two reasons:

1. Wilhelm did not owe Park Place a duty to procure "full" insurance coverage; and
2. Wilhelm did not sell the insurance policy covering the 2008 date of loss.

In response to Wilhelm's motion, Park Place moved for summary judgment against Wilhelm asserting Wilhelm acted negligently by failing to procure full insurance coverage. On April 12, 2010, the District Court issued its Order and Rationale on Pending Motions. The District Court granted Wilhelm's Motion for Summary Judgment and denied Park Place's Motion for Summary Judgment. The District Court held Park Place's request for insurance coverage was not specific enough to impose a duty upon Wilhelm to procure coverage for the carport. In addition, the District Court held Wilhelm did not make a promise to Park Place to procure insurance for the carport. Thus, the District Court determined Wilhelm did not owe Park Place a duty to procure insurance for the carport. As a consequence, the District Court denied Park Place's Motion for Summary Judgment and Park Place appealed.

On July 12, 2010, MTLA filed a motion with the Clerk of Montana Supreme Court asking for permission to file an *amicus* brief. In the briefing, MTLA argues the Montana Supreme Court should change well-established Montana case law regarding the extent of an insurance agent's duty toward a client. See (MTLA Br. at 16) (asking the Court to remand for consideration of liability under a different standard of care). According to MTLA, the Montana Supreme Court should overrule nearly 90 years of Montana case law requiring an insured to make a specific request for insurance. In its place, MTLA asks the Court to impose an undefined "professional standard of care." Because this issue was not raised at the District Court level, the Court should deny MTLA's motion to file an *amicus* brief.

### **ARGUMENT**

#### **I. THE COURT SHOULD DENY MTLA'S REQUEST TO FILE AN *AMICUS* BRIEF BECAUSE MTLA IS ATTEMPTING TO RAISE ISSUES OUTSIDE THE PLEADINGS.**

The Court should deny MTLA's motion because MTLA is attempting to raise issues outside the pleadings. Under Montana law, the right to be heard as *amicus curiae* is within the discretion of the Court. State ex rel. Bennett v. Bonner, 123 Mont. 414, 420-421, 214 P.2d 747, 751 (1950). *Amici curiae* are not parties and cannot assume the functions of parties. Carter v. Mississippi Farm Bureau Cas. Ins. Co., 2005 MT 74, ¶ 16, 326 Mont. 350, 109 P.3d 735. *Amici curiae* cannot create, extend, or

enlarge issues not raised by the parties. Montana Wildlife Federation v. Sager, 190 Mont. 247, 265, 620 P.2d 1189, 1200 (1980). The brief of *amicus curiae* will only be considered insofar as the brief coincides with the issues raised by the parties to the action. Id.

In this case, MTLA is attempting to create, extend, and enlarge the number of issues before the Court. The issues in this case are straightforward:

1. Whether a request for “full coverage” constitutes a specific request for insurance sufficient to impose a duty upon an agent;
2. Whether Wilhelm owes Park Place a duty of care for a loss occurring under a policy of insurance he did not sell; and
3. Whether Wilhelm breached any duty to procure by failing to list the carport on the insurance application.

On the other hand, the MTLA is attempting to submit a brief that goes far beyond the issues raised in the pleadings. Throughout the brief, MTLA argues the Montana Supreme Court should change the law to impose liability on an insurance agent under a “professional standard of care.” This was not an issue raised before the District Court. The parties did not engage in any substantive briefing regarding whether Wilhelm’s liability should be determined under a “professional standard of care.” Nor did Park Place suggest Montana law should be changed or altered to modify the scope

of an insurance agent's duty of care. The first time any person suggested liability should be determined under a "professional standard of care" occurred when Park Place and MTLA filed their Supreme Court briefs. At the District Court level, the issue was whether Wilhelm was liable under existing Montana case law. In fact, Park Place took the position that Wilhelm breached his duty of care under the standard set forth in Gay v. Lavina State Bank, 61 Mont. 449, 202 P.753 (1921). See (Park Place's Appeal Br. at 28) (stating Wilhelm breached his duty of care under prior Montana case law).

The proposed motion by MTLA is nothing more than an attempt to reargue the same position taken by MTLA in Monroe v. Cogswell Agency, 2010 MT 134, 356 Mont. 417, \_\_\_ P.3d \_\_\_. In fact, the proposed submission by MTLA is nothing more than a submission of virtually the same brief submitted in Monroe. There are multiple sections that consist of identical text and argument. Even though the briefs are the same, the issues before the Court are different. In Monroe, the primary issue was whether the insurance agent breached his duty of care by failing to assess and advise the insureds about insurance needs. Id., ¶ 31. Unlike Monroe, Park Place has taken the position it knew its insurance needs and requested the coverage. The other issue in Monroe was whether the plaintiffs asserted the insurance agent breached the duty of care by failing to procure higher limits. Id., ¶ 32. For that issue, the Court decided the

matter under existing case law. See id. (referencing the duty of care established in Gay v. Lavina State Bank, 61 Mont. 449, 202 P.753 (1921)). Therefore, because the issues in this case are different from Monroe, the Court should not allow MTLA to file a brief for the purpose of rearguing the Monroe issues.

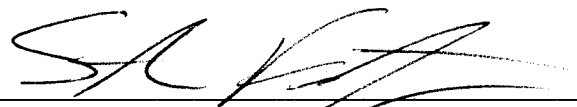
**STATEMENT OF RELIEF SOUGHT**

In conclusion, the Court should not allow MTLA to file an *amicus* brief for the purpose of expanding and enlarging the issues before the Court. The issues raised by the parties at the District Court level can be decided under existing Montana law. Therefore, the Court should deny MTLA's motion to file an *amicus* brief.

DATED this 23<sup>rd</sup> day of July, 2010.

Respectfully submitted,

SMITH, WALSH, CLARKE & GREGOIRE, PLLP

By: 

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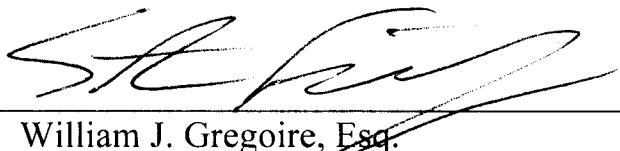
Plaintiff and Appellee William F. Wilhelm

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Corel WordPerfect X3 is not more than 1,250 words, excluding certificate of service and certificate of compliance.

DATED this 23<sup>rd</sup> day of July, 2010.

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing was duly served upon the following by mail, hand delivery, Federal Express or facsimile transmission:

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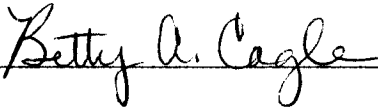
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DATED this 23<sup>rd</sup> day of July, 2010.

  
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